

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3
4 UNITED STATES OF AMERICA

5 PLAINTIFF

6 VS. CRIMINAL NO. 00-215
7 CIVIL ACTION NO. 02-180

8 PAUL LUCAS

9 DEFENDANT

10 PROCEEDINGS

11 Transcript of EVIDENTIARY HEARING, commencing on
12 WEDNESDAY, AUGUST 4, 2004, 10:00 A.M., in the United States
13 District Court, U.S. Courthouse, Eighth Floor, Pittsburgh,
14 Pennsylvania, before the HONORABLE GUSTAVE DIAMOND, UNITED
15 STATES SENIOR DISTRICT COURT JUDGE.

16 APPEARANCES:

17 For the Government: By: Kelly Labby, Esquire
18 Assistant U.S. Attorney
19 Office of the U.S. Attorney
20 Fourth Floor, U.S. Courthouse
21 Pittsburgh, Pennsylvania 15219

22 For the Defendant: By: John W. Knorr, Esquire
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24 One Bigelow Square
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20

Reported by: Sandra Wenger, Official Court Reporter

21

1017B U. S. Courthouse

Pittsburgh, Pennsylvania 15219

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WITNESS

DIRECT CROSS REDIRECT RECROSS

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V. BAGINSKI, ESQ. 14 25 -- --

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1 WEDNESDAY MORNING SESSION, AUGUST 4, 2004, 10:00 A.M.

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3 (Whereupon, the following was had in open Court.)

4 THE COURT: Good morning.

5 MS. LABBY: Good morning, Your Honor.

6 MR. KNORR: Good morning, Your Honor.

7 THE COURT: The Court is convened at this time in
8 the case of United States of America versus Paul Lucas,
9 Petitioner. This was, originally, Criminal Action No.
10 215009. It's now Civil Action 02-180. Civil action being
11 the civil action that was created by the defendant's petition
12 or filing a motion under Section 2255, seeking relief under,
13 under 28 U.S.C., Section 2255.

14 We are convened this morning pursuant to an order
15 of this Court, entered on the ninth day of June of this year,
16 setting this time and place for a hearing solely on the issue
17 created by the defendant when his motion under 2255, where he
18 contends that he received ineffective assistance of counsel
19 because counsel, who had been appointed to represent him at
20 the criminal action, at which he entered a plea of guilty and
21 was sentenced, was allegedly ineffective because he failed,
22 at the defendant's request, he failed to file a notice of
23 appeal, notwithstanding the defendant's request that he do
24 so.

25 Are you ready to proceed?

1 MS. LABBY: Yes, sir, Your Honor.

2 MR. KNORR: May I, Your Honor?

3 THE COURT: Yes. Mr. Knorr.

4 MR. KNORR: If it please the Court. My name is
5 John Knorr, counsel for Paul Lucas. And, at this time, I
6 would make a motion to the Court for leave to withdraw my
7 client's petition under Rule Section 2255.

8 I, as the Court knows, I'm comparatively new to
9 this case, but in the little that I have been involved in it,
10 the time that I met with my client, I have ascertained, as of
11 this morning, and my meeting with my client yesterday in the
12 Allegheny County Jail, he has determined that he does not
13 wish to pursue the issue as it relates to the allegation of
14 ineffective assistance of counsel.

15 He has raised a question concerning the
16 applicability of Blakely versus Washington to his case. I am
17 not in the position to advise him, much less any attorney in
18 the country, perhaps, as to the likelihood of that case to
19 his case. But I do know that if he is to pursue relief under
20 2255, the proper forum would be to petition the Third Circuit
21 for permission to amend his 2255 petition to raise that

22 claim.

23 THE COURT: I believe that's accurate, because it's
24 time. The time he must have filed has long since passed.

25 MR. KNORR: I agree, Your Honor. For that reason,

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1 we do not wish to pursue the petition as raised this morning.

2 I am asking the Court to permit him to withdraw
3 that, indicating to the Court that it's his intention to have
4 me explore a petition to the Third Circuit.

5 THE COURT: He's withdrawing all the matters that
6 he presently may have before the Court. The matter with
7 regard to the Blakely issue has not formally been presented
8 to this Court, at this point, and I understand it,
9 apparently, you had discussed the matter with counsel for the
10 government, who had advised the Court that you might be
11 presenting this matter this morning. But other than that, we
12 have nothing that's on the record before this Court.

13 MR. KNORR: That is correct.

14 THE COURT: What you are saying is that all that is

15 before this Court is the motion under 2255 alleging in-

16 effective assistance of counsel and some other matters that I

17 am not -- I can't outline for you. But, at this point, there

18 were other matters raised. You are saying your client wishes

19 to withdraw all of that?

20 MR. KNORR: Yes, Your Honor.

21 THE COURT: You better talk with your client and

22 find out. He seems to indicate disagreement with that.

23 MR. KNORR: Okay.

24 (Whereupon, an off-the-record discussion was had.)

25 THE COURT: Now, the 2255 motion was based entirely

6

1 on the ineffective assistance of counsel. There were nine

2 specifications, the leading one being a failure to file a

3 notice of appeal.

4 But all the others were other allegations of the

5 way that counsel was ineffective. For example, failing to

6 consult with petitioner regarding pretrial motions,

7 prohibiting defendant from assisting in his defense, failing

8 to contest search warrants, inadequate -- we had hearings on

9 the search warrant, did we not, in this case?

10 Failing to contest the amount of drugs attributable
11 to petitioner, failing to challenge petitioner's role in the
12 conspiracy, failing to argue for downward departure,
13 overstatement of defendant's criminal history category, due
14 to petitioner's emotional, physical disability, and family
15 circumstances.

16 MS. LABBY: Your Honor, if I may. The government
17 has responded to all of those in writing.

18 THE COURT: I know.

19 MS. LABBY: In a written response.

20 THE COURT: So, now, you have consulted further
21 with your client and what is his position with regard to what
22 he wants to do here this morning?

23 MR. KNORR: My client's position is that, on the
24 issue that was scheduled for hearing this morning, he wishes
25 to withdraw his allegation that Mr. Baginski was ineffective

1 for failing to file a notice of appeal. Therefore, there is

2 no need to have an evidentiary hearing on that issue.

3 THE COURT: All right.

4 Mr. Lucas, is that accurate?

5 THE DEFENDANT: (Indicating.)

6 MR. KNORR: Could Mr. Lucas stand? As he's
7 indicated, he has a little trouble hearing, Your Honor.

8 THE COURT: Yes. Come up here.

9 MR. KNORR: Mr. Lucas, I have indicated to the
10 Court that it is your intention to withdraw that part of your
11 2255 petition that relates to an allegation that your prior
12 attorney, Mr. Baginski, was ineffective for failing to file a
13 notice of appeal. Is that correct?

14 THE DEFENDANT: The rest of my 2255 still in
15 effect.

16 MR. KNORR: It's all still in effect. We haven't
17 done anything to it.

18 THE DEFENDANT: Yes. It's in effect?

19 THE COURT: Your 2255 motion is still before the
20 Court. The matter that was set for hearing this morning had
21 to do with the allegation that Mr. Baginski was ineffective
22 because he failed to file a notice of appeal, notwithstanding
23 the fact that you wanted him to do that.

24 Now, we have been advised by your current counsel,
25 Mr. Knorr, that it is your desire to withdraw that portion,

8

1 at least that portion of your motion, under 2255, that
2 alleges that he, Mr. Baginski, was ineffective because he
3 failed to file a notice of appeal. Is that what you want to
4 do?

5 I think the answer is, yes, but you have to tell
6 us.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: That's what you want to do?

9 THE DEFENDANT: Yes.

10 THE COURT: Now, why is it that you want to do
11 that?

12 THE DEFENDANT: The prosecution threatening me with
13 --

14 MR. KNORR: Let me speak for my client, Your
15 Honor.

16 I have explained to my client that the prosecution

17 has advised they believe that any testimony offered in
18 furtherance of his further petition would be untruthful.
19 They believe it would be untruthful testimony and that they
20 would consider very seriously and are considering very
21 seriously prosecuting my client for perjury, in the event
22 that that testimony goes for forward.

23 THE COURT: That's always the prerogative of the
24 government, if they believe that a witness has testified
25 falsely under oath.

9

1 But, if you believe that your testimony is
2 truthful, Mr. Lucas, you still have the right to pursue it at
3 this point. The government isn't threatening to bring
4 charges against you if you tell the truth.

5 MR. KNORR: Your call, Mr. Lucas.

6 MS. LABBY: Your Honor, if I may interrupt? I want
7 to be very clear about that.

8 If you feel that you are telling the truth, if you
9 feel, Mr. Lucas, that you are telling the truth, then you
10 testify. However, it is our belief that, based on your

11 petition, there are inconsistencies and that you have a
12 record before this Court of not testifying truthfully. That
13 is our position.

14 But if your allegations in this petition are true,
15 then you testify. Do you understand me? Can you hear me?

16 THE DEFENDANT: Yes. I can hear you. I don't
17 understand exactly what you are threatening to say. You said
18 that I didn't testify truthfully?

19 MS. LABBY: We believe that you have not testified
20 truthfully at prior hearings before this Court. In your
21 attempt to withdraw your prior plea before this Court, you
22 did not testify truthfully. That is our position.

23 THE COURT: It is not the government's position --
24 just a minute. You are not saying that if the defendant
25 petitioner testifies today, you will bring perjury charges

10

1 based on the testimony that he gave at his suppression
2 hearing; you are not saying that?

3 MS. LABBY: No. No. No.

4 THE COURT: You are saying that if he testifies

5 today and testifies falsely, today, you will have that option

6 to bring perjury charges against him?

7 MS. LABBY: Yes, Your Honor. I am not committing

8 that the government would do that.

9 Your Honor, just let me explain. Our office is

10 becoming burdened by petitions that are being raised like

11 this by prisoners that are untruthful with an allegation like

12 this, that counsel failed to file a notice of appeal and

13 nothing more.

14 A prisoner, in this circumstance, is automatically

15 entitled to a hearing. Mr. Lucas, in this case, has

16 inconsistent allegations in his petitions. That is what we

17 intend to produce at this hearing today, and to demonstrate,

18 and if we can demonstrate that today, it's my position that I

19 will advocate to prosecute you. I don't have a commitment

20 from my office that we will do that. However, demonstrated

21 on your past --

22 THE COURT: All right. The government is saying

23 nothing more than what the government always has the option

24 to do if they believe that a witness has testified falsely

25 under oath. The government always has the option to -- of

1 presenting the matter to a grand jury and seeking an
2 indictment.

3 But, it is not easy to prove perjury, and the
4 government doesn't generally bring perjury charges. But you
5 have to be advised, at any time you testify under oath in
6 Court, that you must testify truthfully. And, if you fail to
7 testify truthfully, that the government can bring perjury
8 charges against you.

9 Now, if you believe that your testimony is truthful
10 here, you should, you should testify, if that's what you
11 believe is, is in your best interests. You have counsel.
12 Counsel has been appointed to represent you in this matter.

13 Discuss this matter with counsel and decide what
14 you want to do. We'll give you some more time to do that.

15 MR. KNORR: Thank you, Your Honor.

16 (Whereupon, an of-the-record discussion was had.)

17 MR. KNORR: May it please the Court. My client,
18 after consultation with me, does wish to withdraw the

19 allegation as to ineffective assistance of counsel. He is
20 concerned that by withdrawing that the Court's going to think
21 he was lying when he made the allegation.

22 We are just saying we are withdrawing it. We are
23 not pursuing it. In addition to some factual issues, I have
24 advised him concerning the likelihood of success on that
25 issue from a legal point of view, based on my review of all

12

1 the materials in this case. But it is his desire to withdraw
2 that portion of his 2255 petition.

3 THE COURT: Is that entire 2255 petition, is it
4 based on the allegation of ineffective assistance of counsel?
5 There are nine specifics with regard to that.

6 Now, when you say that you want to withdraw the
7 portion of the 2255 that has to do with ineffective
8 assistance of counsel, that's all there is to it?

9 MR. KNORR: I am sorry, Your Honor. I misspoke.
10 The allegation of ineffective, as it relates to failing to
11 file the notice of appeal.

12 THE COURT: That's your desire, Mr. Lucas?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You understand that you are perfectly
15 free, as you stand here today, to come in, to take the
16 witness stand, and to testify as to what you believe
17 transpired between you and Mr. Baginski.

18 Mr. Baginski is here in the courtroom. He has
19 previously filed an affidavit indicating what has happened,
20 what happened between you and him after your sentencing in
21 this Court.

22 He had a meeting with you on January 12 following
23 your sentencing by this Court. On the fifteenth, he wrote a
24 letter to you confirming that, and that that's been filed in
25 this case. Although, it's not as a matter of record at this

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1 point. But I want it to be a matter of record in this
2 hearing.

3 So, at this point, you are stating that you don't
4 want to testify because you fear the possibility that the
5 government will file perjury charges against you; is that

6 right?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. You don't have to testify.

9 I want the government to support its position that

10 Mr. Baginski did, in fact, give, discuss the matter with the

11 defendant in this case. The petitioner in this case.

12 Put in your case, so we have a record with regard

13 to that. Defendant hasn't testified. Technically, he hasn't

14 met his burden of proof. But I believe, in order for this

15 record to be in proper shape, since Mr. Baginski is here,

16 since his integrity has been impugned, he should have the

17 opportunity to testify and to support his position, that he

18 didn't, in fact, file the notice of appeal because it was the

19 defendant's desire not to file a notice of appeal having been

20 advised by Mr. Baginski as to the pros and cons of doing so.

21 MS. LABBY: Yes, Your Honor. The government calls

22 Mr. Baginski.

23 VINCENT BAGINSKI, ESQUIRE, A WITNESS, having been

24 first duly sworn, was examined and testified as follows:

25 THE WITNESS: Good morning, Your Honor.

1 DIRECT EXAMINATION

2 BY MS. LABBY:

3 Q Good morning.

4 A Good morning.

5 Q How long have you been of service as a defense attorney?

6 A I graduated from Duquesne Law School in 1974. So, this
7 will mark my thirtieth year, where I was admitted in October
8 of '74.

9 Q And how many criminal cases have you handled over the
10 course of your career?

11 A Hundreds and hundreds of cases. If we were to include
12 cases that were disposed of by means of agreements at
13 preliminary hearings, I would venture to say it would be in
14 the thousands.

15 Q You represented Mr. Lucas at all stages of the
16 proceedings in this case -- in District Court?

17 A I did.

18 Q Mr. Lucas entered a plea agreement in this case?

19 A Yes, he did. On the date that we actually were
20 scheduled for trial.

21 Q You negotiated, among other things, that he was to

22 receive three points for acceptance of responsibility?

23 A Correct.

24 Q He later attempted to withdraw his plea; is that

25 correct?

15

1 A Yes, he did.

2 Q He was unsuccessful in that effort; was he not?

3 A That's correct.

4 Q There was a hearing and the motion to withdraw that

5 plea; is that correct?

6 A Yes. Early January, I believe it was. I have never

7 read the transcript, but I recollect that, that that was

8 prior to the sentencing.

9 Q He gave sworn testimony at the hearing?

10 A Yes, he did.

11 Q The Court in the exercising of its discretion declined

12 to allow him to withdraw the plea, and we covered that?

13 A That's correct.

14 Q Based upon his testimony, you, you had concerns that the

15 government might have grounds for obstruction of justice and
16 enhancement at sentencing?

17 A I was more than concerned. I thought that they could
18 succeed.

19 Q Did you also have grounds that the government might have
20 concern or concern on your part that the government might
21 have ground for the one-point for acceptance of
22 responsibility that the Court might deny that?

23 A My recollection of the motion to withdraw hearing was
24 that Mr. Ivory, representing the government, during the
25 course of this case, had initially requested that five points

16

1 be added to the offense level for Mr. Lucas. Initially,
2 during that --

3 MR. KNORR: I am sorry, Your Honor. My client's
4 indicating that he can't hear. Could we give him a seat a
5 little closer?

6 THE COURT: Move his seat.

7 THE WITNESS: I'll try to talk a little louder,

8 Mr. Knorr. Does that help?

9 THE COURT: Whatever he wants. Do you need to be
10 closer? Is that close enough?

11 MR. KNORR: When he talks.

12 BY MS. LABBY:

13 Q Okay. You met with Mr. Lucas following sentencing to
14 discuss an appeal?

15 A I did. If you want me to go further with my concern
16 there?

17 Q I am sorry. Yes.

18 A What had happened was, during the course of the motion
19 to withdraw, Mr. Ivory had indicated that he was requesting
20 that five points be added to the offense level. I believe
21 that was his initial request. And that, now, based upon the
22 motion to withdraw, that he should be, the three points total
23 that he had for acceptance should be taken back and should be
24 assessed against Mr. Lucas.

25 Two is Mr. Ivory was arguing that two points should be

1 added on to the offense level score, in that he was arguing

2 obstruction of justice based on entering a plea of guilty,
3 having said I'm guilty, and then coming in and withdrawing
4 his plea, saying, no, that is incorrect.

5 During the course of that, Mr. Ivory, I believe I have
6 never read that transcript, but I believe Mr. Ivory then
7 reduced his request and then asked Judge Diamond simply to
8 add on one point, taking back an acceptance of responsibility
9 and adding on two points for obstruction of justice. Judge
10 Diamond didn't add on any points.

11 Q You met with Mr. Lucas following sentencing to discuss
12 an appeal; is that correct?

13 A Yes. Absolutely.

14 Q Where did you meet with him?

15 A During the whole time I represented Mr. Lucas, he was
16 incarcerated at the Allegheny County Jail. He was held
17 pending trial.

18 Q I am sorry?

19 A He was held pending trial.

20 Q You discussed appealable issues with him at that time?

21 A Absolutely.

22 Q What did you discuss as potentially appealable issues?

23 A Well, we had had a suppression argument based on search
24 warrants that had been issued in the case. However, we
25 didn't enter a special plea reserving any right concerning an

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1 appeal to argue that. And my opinion, at that point was that
2 Judge Diamond's multi-page opinion was right on point and we
3 had no possibility of succeeding, even if we would have had
4 that as an issue for appeal.

5 We didn't have any sentencing issues, but we discussed
6 what potentially might be a sentencing issue. But the plea
7 agreement actually said the offense level based upon drug
8 quantity.

9 Then we had the two points added on that we had agreed
10 to as concerning late organizer. That wasn't a factual
11 determination that was made by Judge Diamond. The guideline
12 was within the sentence. In fact, my recall is that after
13 sentencing, Judge Diamond had reduced the sentence. So, what
14 we discussed was, literally, my feeling that all we could
15 present to the Third Circuit was that Judge Diamond had
16 abused his discretion in not granting Mr. Lucas's motion to

17 withdraw.

18 That, literally, was what I thought we could appeal to
19 the Third Circuit. I thought, well, maybe we could throw in
20 some other things, but that really would have been the key
21 issue.

22 However, again, I have never read the transcript, but
23 my recall is that Judge Diamond instructed me to advise
24 Mr. Lucas, because I had not done so previously, and I
25 believe I stood up and said that, in Court, the date of the

19

1 hearing. But Judge Diamond, I believe, directed me to make
2 sure that Mr. Lucas was advised that if he filed an appeal,
3 the government may, at that point, there was no doubt in my
4 mind, based on my conversations with Mr. Ivory, that they
5 would file a cross appeal, requesting the addition of the one
6 point for acceptance and the two points for obstruction. And
7 I thought that that was placing him in an horrendous,
8 horrendous risk situation. I really felt they could succeed
9 with that.

10 Q And the judge, although doing that, did not dissuade the

11 defendant from taking an appeal; is that correct?

12 A No. No. Not at all. Because I had not advised him of

13 that prior to the hearing on the motion to withdraw, Judge

14 Diamond was just saying, Mr. Baginski, don't forget to tell

15 him about these things.

16 It wasn't a threat. It was just, hey, Vince, make sure

17 that you do this.

18 Q Did you do so?

19 A Absolutely.

20 Q When you left the jail that day, after consulting the

21 defendant, what was the understanding that you had reached

22 with him?

23 A The understanding was that Mr. Lucas did not want to

24 pursue an appeal to the Third Circuit Court of Appeals.

25 Q Did you have any reason to think that he did not

20

1 understand or comprehend the agreement that you had reached?

2 A None whatsoever. He understood that the risk absolutely

3 outweighed the possibility of success.

4 MS. LABBY: If I may introduce Government Exhibit

5 A, Your Honor.

6 BY MS. LABBY:

7 Q You wrote a letter to your client on January 15; is that

8 correct? Do you recall that?

9 A Yes.

10 Q I show you a copy. Is the letter written on your

11 letterhead?

12 A Yes, it is.

13 Q Is it signed by you?

14 A No. This copy is not. Mr. Lucas, I believe, would have

15 received the original.

16 Q Okay.

17 A I typically don't sign file copies. I may put an S,

18 slash.

19 Q Okay. I see. Did the letter confirm your

20 understanding?

21 A Yes, it did.

22 Q I just wanted to direct your attention to paragraph 3.

23 It reads, "As we discussed, any appeal of your case to the

24 Third Circuit would be limited to the Court's discretionary

25 denial of your motion to withdraw guilty plea, in that the

21

1 likelihood of success is extremely small compared to the
2 extremely great likelihood that the anticipated government's
3 cross appeal of the Court's denial of their request for a one
4 point acceptance of responsibility and a two point increase
5 of obstruction of justice in your offense level, the risk is
6 enormous. Accordingly, I have not and will not file an
7 appeal of your case to the Third Circuit."

8 A Is that accurate?

9 Q Accurately read?

10 A Yes.

11 Q Why did you send a letter?

12 A It's pretty much my standard procedure that, if there
13 are things that I'm requested to do or not do, you typically
14 write -- I typically write confirming letters. Paragraph one
15 and two address things that I had also told Mr. Lucas that I
16 would do. So, it's a confirming letter in respect to all
17 three of those items in those paragraphs.

18 Q Now, I'll show you what's marked as Government Exhibit

- 19 B. I would just like to direct your attention, -- first of
20 all, is this the letter that you recall receiving from your
21 client?
- 22 A Yes.
- 23 Q Dated March 28, --
- 24 A Yes.
- 25 Q -- 2002? Directing your attention to the top paragraph.

22

- 1 It reads, "Since I have neither heard from you, nor from the
2 Court of Appeals for the Third Circuit, I am filing a new
3 notice of appeal in the, the above matter." Is that
4 accurate?
- 5 Is that an accurate reading?
- 6 A Yes.
- 7 Q What was your reaction when you received the letter?
- 8 A Total surprise.
- 9 Q Why?
- 10 A He had never directed me to file an appeal. In fact, it
11 was the contrary. He had agreed with me that we would not

12 file an appeal.

13 Q Did you respond to the letter?

14 A Yes, I did.

15 Q I would like to show you what is marked as Government

16 Exhibit C.

17 THE COURT: You have identified two exhibits, A and

18 B. You haven't offered them in evidence, but you have had

19 testimony concerning the contents. Are you offering them in

20 evidence?

21 MS. LABBY: Yes, I am, Your Honor. I am sorry.

22 THE COURT: Any objection?

23 MR. KNORR: No objection.

24 THE COURT: A and B are received in evidence.

25 MS. LABBY: This is Exhibit C, Your Honor.

23

1 THE COURT: If there is no objection by counsel to

2 Exhibit C?

3 MR. KNORR: Correct.

4 THE COURT: It's admitted.

5 BY MS. LABBY:

6 Q Would you read the first two paragraphs for the Court?

7 A "This letter acknowledges my receipt of your letter,

8 dated May 28, 2002, that was received by me in this morning

9 mail. Paul, quite frankly, I am surprised by your letter.

10 Enclosed please find a copy of my letter to you dated

11 January 15 2002. You will note that it was a letter

12 confirming our meeting at the Allegheny County Jail on

13 Sunday, January 13, 2002, wherein, essentially, you and I

14 agreed that no appeal would be filed with the Third Circuit

15 Court of Appeals. Your letter mentions a new notice of

16 appeal. I did not file an appeal. If you had previously

17 done so, would you please supply me with a copy of it, as

18 well as a copy of the new one."

19 Q Why did you send this letter to Mr. Lucas?

20 A I was totally surprised. In fact, it's based on

21 day-to-day office procedures and schedules and hearings and

22 cases that I am involved in. It's really strange, after I

23 had reviewed this letter, to see that I responded that same

24 day. Sometimes it takes me a while to respond. But I was so

25 surprised by this that I wrote him a letter that day.

1 Q You make it a practice to discuss matters of appeals

2 with your clients; is that correct?

3 A Always.

4 Q You consulted with Mr. Lucas in this case?

5 A Yes.

6 Q Did you consult about the benefits and dangers of an

7 appeal; correct?

8 A Yes. I still feel I haven't researched the issue but I

9 still think he is in the same jeopardy. If he is allowed to

10 file the appeal. I think he's still in the same jeopardy,

11 again, not researching the issue, because I'm here to

12 testify. But the government may well have the opportunity to

13 file the cross appeal now, at this stage, to request those

14 three points.

15 Q Just to summarize. You reached a decision not to

16 appeal; is that correct?

17 A That was a joint decision.

18 Q Had Mr. Lucas told you he wanted you to file a notice of

19 appeal, against your advice, would you have filed it?

20 A Yes. I also would have written a letter saying that it

21 was against my advice, but I certainly would have done so. I
22 have pursued other appeals to the Third Circuit Court of
23 Appeals on numerous occasions.

24 MS. LABBY: Thank you.

25 THE COURT: Cross-examine.

25

1 - - -

2 CROSS-EXAMINATION

3 BY MR. KNORR:

4 Q Mr. Baginski, do you recall attending a detention
5 hearing on behalf of Mr. Lucas?

6 A Yes. That was correct. The government had filed a
7 motion to detain pending trial.

8 Q And Mr. Lucas advised you and he was ordered to be
9 detained; correct?

10 A Correct.

11 Q Did you discuss the appealability of that decision by
12 the United States Magistrate-Judge?

13 A Sure.

14 Q And do you recall what his advice to you was concerning

15 that?

16 A Well, I can't give you a specific. I'll give you the

17 end result. It was not to take an appeal of that decision

18 but there was many more conversations that led up to that.

19 As you know, we could have, in fact, requested that the

20 local District Court Judge review the determination that had

21 been made by the Magistrate-Judge. The issue in the case is

22 whether or not there is a danger to the community and whether

23 or not there is a risk of flight. Those are the two issues.

24 Based -- and I didn't review my whole file as concerns

25 that, but I recall this. I think Agent Hoy testified or an

26

1 agent testified based upon the charges there was already the

2 presumptions for both of those two considerations.

3 Q Do you happen to remember whether you advised Mr. Lucas,

4 when he said I want to appeal, initially, the decision that

5 he be detained, that that could be done at a later time?

6 A Yes.

7 Q Do you recall having a discussion with Mr. Lucas

8 concerning the denial of the motion to suppress in the
9 pretrial motions?

10 A Yes.

11 Q Do you know whether Mr. Lucas at that time advised you
12 that he wished to appeal the denial of those motions?

13 A I don't recall, specifically, but I would think that
14 it's the situation where routinely we'll discuss the
15 determination of suppression issues, pretrial motions,
16 knowing that those are basically interlocutory in nature.

17 That, subsequently, if we would go to trial, then we
18 would have the right to appeal that issue. So, even though I
19 can't recall a specific conversation with Mr. Lucas, I would
20 be pretty certain that we had that kind of conversation.

21 Q And you subsequently negotiated a plea agreement with
22 the government that did not preserve in any special way the
23 appealability of those pretrial issues; is that correct?

24 A Yes. That's correct. We didn't do a special plea
25 under, I think it's Rule 11(e).

1 Q Do you happen to remember whether you made it clear to

2 Mr. Lucas that he was giving up his right to appeal those

3 pretrial issues?

4 A Yes. That was a wild and crazy morning. Actually, we

5 were prepared to go to trial. It was a Monday morning. Seem

6 to think it was October 11. That's what my recall seems to

7 be right now.

8 And, in fact, I had met with Mr. Lucas in the jail on

9 both Saturday and Sunday, reviewing, generally discussing his

10 case. Next thing we come in, Mr. Lucas comes in, wants me to

11 negotiate a plea. I was negotiating the plea with both

12 Mr. Teitelbaum and Mr. Ivory, because Mr. Teitelbaum had had

13 the case previously.

14 I spent considerable time in the U.S. Marshal's Office.

15 And, in fact, Mr. Ivory and Mr. Teitelbaum were calling me on

16 the cell phone. And we had a big discussion as concerning

17 what was left to appeal, what was not left to appeal, what we

18 were doing here, what we were doing there.

19 There is no doubt in my mind that Mr. Lucas knew what

20 the plea agreement was. What we were attempting to do is

21 rather than go in blind-faced, we were trying to figure out

22 what the drug quantity amount would be. What, in fact, any

23 add-ons would be.

24 We were uncertain as to the criminal history category,
25 based upon numerous disclosures that had, that had been made

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1 by Mr. Lucas to me as concerns prior record. No question in
2 my mind he knew and he agreed that that was the plea
3 agreement and, literally, we were not going to have anything
4 left to appeal. No question in my mind that was ongoing
5 discussions.

6 Mr. Lucas, as I recall, even said, well, what we will --
7 we have left here? What can we do here? I attempted to get
8 Mr. Ivory and Mr. Teitelbaum to do a less than two kilos, but
9 they absolutely refused. I attempted to get them to not
10 pursue the later organizer, but they absolutely, positively
11 would not. Simply, we were listed for trial. Their
12 witnesses were here.

13 MR. KNORR: May I have a moment, Your Honor?

14 (Whereupon, an off-the-record discussion was had.)

15 BY MR. KNORR:

16 Q Was there a time at which the government had offered a

17 plea to less than two kilos?

18 A Absolutely. No doubt in my mind. In fact, I was upset

19 that morning with Mr. Teitelbaum. My recall of my

20 conversations with Bruce in advance is they had said, he,

21 initially, said, well, Vince, if your client pleas to two

22 kilos, then we'll do this, we'll do that.

23 I called Bruce on the phone and I said, hey, he said,

24 two. That's the number. That starts this category. And

25 that category, up to two and up to 2.35. My recall of my

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1 conversations with Mr. Teitelbaum, he said, okay. We'll do

2 less than two.

3 At that point, they were not going to add on the two

4 points for later organizer. I was totally upset with

5 Mr. Ivory and Mr. Teitelbaum. That's why Mr. Teitelbaum was

6 involved in our conversations that morning, because I kept

7 telling Mike, well, Bruce had offered me that a long time

8 ago. Bruce had no recall of that simply because we didn't

9 have any written record. I made no question.

10 I relayed that offer to Mr. Lucas. That was, that was
11 months in advance. I'm thinking that was the summer, July,
12 August, of 2001. And now, because we were listed for trial,
13 that just --.

14 Q When did you learn that the plea was going to have to be
15 to more than two kilos?

16 A That morning.

17 Q The morning of the plea?

18 A Correct.

19 Q And prior to that, your discussion with Mr. Lucas
20 assumed that the plea was going to be relatively to the offer
21 that had been made by Mr. Teitelbaum to less than to kilos?

22 A No.

23 Q No?

24 A There was a point in time, my recall would be a week,
25 two weeks, prior to the actual trial date. And I have

1 experienced this a lot of times with AUSAs, that say, hey,
2 Vince, what's your client going to do? Look, we are not

3 going to hold this offer out forever. That if, in fact, your
4 client doesn't accept this offer, we are withdrawing our
5 offer.

6 So, there was a point in time, I don't remember, a week,
7 two weeks, three weeks, I don't specifically recall. So, on
8 that, on that particular morning, there was no offer that was
9 still out there by the government. It was renegotiating an
10 offer. And, again, without being redundant, that's why
11 Mr. Teitelbaum was also involved in these conversations,
12 because he initially had the case.

13 Q Did Mr. Lucas express to you his displeasure with the
14 fact that he was not pleading to less than two kilos as had
15 been offered previously?

16 A Oh, sure. He made that quite clear. I made this quite
17 clear to the AUSA, as well.

18 Q Did you make it clear that he wasn't pleading guilty to
19 less than two kilos, as the record indicates?

20 A Absolutely. We had, we had lengthy discussion as
21 concerns the fact that, you know, I could not get back the
22 less than two kilo offer.

23 Q Now, would you consider Mr. Lucas, during the period of
24 your representation, what you might refer to as a high

25 maintenance client?

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1 A Yes.

2 Q He need a lot of attention?

3 A We have known each other a long time. You've practiced

4 defense work for a long time. I think we share that same

5 high maintenance definition in our minds.

6 Q He tried to -- he wanted to have a lot of contact with

7 you?

8 A Sure.

9 Q Did he call you on the phone; do you recall? Did your

10 office accept collect calls from the jail?

11 A We do when somebody is there. I am a sole practitioner.

12 I have a law clerk who typically works with me. I do not

13 have a secretary. My secretary has been replaced by voice

14 recognition software. I talk to my computer.

15 Q Recognizing him as, for lack of a better phrase, as a

16 high maintenance client, was it unusual that, that you did

17 not hear from him between the date of your letter to him,

18 January 15, and his letter to you, March 28?

19 A No, not unusual at all.

20 Q Why was that not unusual?

21 A Typically, his case was over. I had not been directed

22 to file an appeal. My letter to him, I think my letter,

23 basically, says, when you get classified designated, I don't

24 know if I used that terminology, but when BOP places you

25 somewhere, let me know just in the event that there is

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1 anything to keep you advised of or to keep you aware of.

2 Typically, it takes some clients -- I never get their new

3 address. They don't respond to me, ever.

4 But, no, not -- his case was over and, you know, I

5 expected to get a letter simply because I believe, I believe

6 I was still attempting to get properties returned that had

7 been taken during the course of a search that the government

8 really had not wanted to retain.

9 MR. KNORR: That's all I have, Your Honor.

10 THE COURT: Redirect?

11 MS. LABBY: Your Honor, we have nothing. Thank

12 you.

13 THE COURT: Thank you, Mr. Baginski.

14 (Whereupon, the witness was excused from the

15 witness stand.)

16 THE COURT: Government have anything else?

17 MS. LABBY: No. Thank you.

18 THE COURT: Mr. Lucas, step up here.

19 Now, earlier, you have the burden of proof on this,

20 which means that, normally, you would have to establish at

21 least a prima facie, some basis, for the Court to rule in

22 your favor before even the government is required to respond.

23 But because of the statements you made concerning

24 your fear of perjury and so forth, and rather than to simply

25 have this record not have the statement of an attorney who

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1 has been accused of ineffectiveness, I have permitted

2 Mr. Baginski to testify and also to give you an opportunity

3 to cross-examine him. And that has been done.

4 Now, even though I stated to you earlier that you didn't

5 have to testify, you have the right to testify if you want to

6 do so. And I'll give you that right to testify now if you

7 wish to testify. You don't have to. I'll make my ruling if

8 you don't testify. But, if you wish to testify, you're free

9 to do it.

10 THE DEFENDANT: I'm not going to testify.

11 THE COURT: You don't want to testify?

12 THE DEFENDANT: No. Yes, sir.

13 THE COURT: That's your privilege. You may be

14 seated.

15 THE DEFENDANT: (Indicating.)

16 THE COURT: The hearing is closed on the question

17 of the ineffective assistance of counsel, based upon on

18 failure of counsel to file a notice of appeal when requested

19 to do so. The Court has received the testimony of

20 Mr. Baginski.

21 The Court finds the witness to be an entirely

22 credible witness and accepts his testimony in toto. There is

23 nothing, there was no basis on cross-examination, or in any

24 other way to question the credibility of the witness, and the

25 Court accepts the witness's testimony.

1 That testimony was corroborated by letters that
2 were received in evidence here, particularly, the letter
3 dated January 15, 2002, from Mr. Baginski to his client, his
4 then client, Mr. Lucas, which summarized a meeting that was
5 held on the previous Sunday, January the thirteenth of 2002,
6 wherein Mr. Baginski indicated that they had discussed the
7 pros and cons of an appeal and that Mr. Baginski had the
8 understanding that an appeal would not be filed. And he
9 stated, unequivocally, that he would not file an appeal.

10 There was no indication that that letter was not
11 received or that, in the ordinary course of business, it
12 would not have been received.

13 The Court finds, therefore, that the allegation
14 that counsel was ineffective for failing to file a notice of
15 appeal has not been sustained, and the motion for relief
16 under 2255, based on that aspect, will be denied.

17 The Court further notes that at the sentencing, as
18 is the custom of this Court, the Court advised Mr. Lucas that
19 he had the right to appeal the sentence, that he had

20 competent counsel who would file a notice of appeal in his
21 behalf if the defendant requested him to do so. Requested
22 counsel to do so. But, if there was any difficulty in that
23 regard, the defendant could affect an appeal himself by
24 contacting the Clerk of this Court and requesting that the
25 Clerk file a notice of appeal in behalf of the defendant.

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1 Obviously, that was, the defendant did not pursue
2 that. So, if there was any disagreement with counsel,
3 Mr. Baginski, on January the thirteenth, 2002, with regard
4 to an appeal, the defendant had knowing notice as to how he
5 could affect the appeal himself, simply by contacting the
6 Clerk of this Court to do so.

7 This Court finds no merit in the defendant's
8 allegation in support of his motion under 2255 that counsel
9 was ineffective for failing to file a notice of appeal. The
10 other matters that were raised on the 2255 remain open. The
11 Court will make a ruling with regard to those matters.

12 Anything else at this time?

13 MS. LABBY: No, Your Honor.

14 THE COURT: Mr. Knorr?

15 MR. KNORR: Your Honor, my appointment in this
16 matter was specifically limited to this hearing.

17 THE COURT: That's right.

18 MR. KNORR: Am I free to investigate the question
19 of petitioning the, the Third Circuit under the Court's order
20 appointing me?

21 THE COURT: Do that. You, your appointment will
22 include that, since you are involved up to this point.

23 Normally, we do not appoint counsel on 2255 motions
24 unless there are certain other extenuating circumstances to
25 justify that. But, in this case, with regard to the, to that

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1 issue, you may do that and that will include, that will be
2 included in the scope of your, your appointment. But that's
3 the end of it.

4 MR. KNORR: I understand, Your Honor.

5 THE COURT: Unless you further petition the Court.

6 MR. KNORR: Thank you, Judge.

7 THE COURT: All right. Anything else?

8 MS. LABBY: No. Thank you.

9 THE COURT: Court's adjourned at this time.

10 THE DEPUTY CLERK: All rise.

11 (Whereupon, the hearing was adjourned at 11:15 a.m.

12 on the fourth day of August, 2004.)

13 - - -

14 C E R T I F I C A T E

15 I certify by my original signature herein that

16 the foregoing is a correct transcript from the record of

17 proceedings in the above-entitled matter.

18

19

20 Sandra Wenger
Official Court Reporter

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*****NOT CERTIFIED WITHOUT ORIGINAL SIGNATURE*****

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